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UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

Twenty-eighth session

SUMMARY RECORD OF THE 563rd MEETING

Held at the Vienna International Centre, Vienna,
on Friday, 12 May 1995, at 9.30 a.m.

**Chairman**: Mr. GOH (Singapore)

**Chairman of the Committee of the Whole:** Mr. GAUTHIER (Canada)

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Any corrections to the records of the meetings of this session will be consolidated in a single corrigendum, to be issued shortly after the end of the session.

V.95 59059 (E) [illegible]

Distr.: 21 November 1995

*The meeting was called to order at 9.45 a.m.*

**DRAFT CONVENTION ON INDEPENDENT GUARANTEES AND STAND-BY LETTERS OF CREDIT** (*continued*) (A/CN.9/405, A/CN.9/408, A/CN.9/411)

**Draft final clauses for the draft Convention** (A/CN.9/411)

1. **Mr. HERRMANN** (Secretary of the Commission), introducing the note by the Secretariat containing a draft of final clauses to be included in the draft Convention (A/CN.9/411), said that it comprised a set of standard provisions, which were closely modelled, where appropriate, on those in other Conventions emanating from the Commission's work.

2. Article B, paragraph (1), concerned the date up to which the Convention would be open for signature. He wondered whether the Commission wished to fix a limit at all, as there might be reasons for leaving it open. In article E, which stated that "no reservations may be made to this Convention", the purpose was not so much to decide whether there should or should not be any reservations in the text of the draft Convention, but rather to state that, apart from those that were explicitly included, no other reservation could be made. There were a number of other Conventions of the Commission which contained a similar provision, and the language was included because otherwise there might be some doubt, despite the Vienna Convention on the Law of Treaties, which had the same rule. Article F, paragraph (1), contained a bracket round the number of instruments of ratification, acceptance, approval or accession required for the Convention to enter into force. The word "fifth" was bracketed because there might be good reason to have a lesser number, in the light of the Commission's experience with the United Nations Convention on International Bills of Exchange and International Promissory Notes, for which ratification by 10 States was required; a group of three States which were considering implementation of that Convention were facing technical difficulties owing to the requirement of 10 ratifications.

3. **Mr. GAUTHIER** (Chairman of the Committee of the Whole) invited the Commission to consider the draft final clauses proposed by the Secretariat article by article.

**Article A**

4. **Mr. GAUTHIER** (Chairman of the Committee of the Whole) noted that there were no comments.

**Article B**

5. **Mr. BURMAN** (United States of America) suggested that the Convention should be open for signature for two or perhaps three years from the date of adoption. While signature did not carry substantial legal significance, it did have some value for some States. In his country's experience, if a specific period was named for which a Convention would remain open for signature, that could encourage Governments to begin the process leading to ratification.

**Article C**

6. **Mr. EDWARDS** (Australia) noted that paragraph (3) referred to circumstances in which the place of business was in a territorial unit that was not included in a declaration of the territorial units to which the Convention was to extend. According to paragraph (2) (b) of article 4, which defined the internationality of an undertaking, "if the undertaking does not specify a place of business for a given person but specifies its habitual residence, that residence is relevant" — but obviously not finally determinative — "for determining the international character of the undertaking". He wondered whether there ought to be a reference to the habitual residence in paragraph (3) of article C.

7. **Mr. HERRMANN** (Secretary of the Commission) said that article 4 dealt with a situation where a guarantor or other party might not have a place of business, in which case the habitual residence would be relevant. It had been suggested that the same clarification could also be made in article 22, which referred to the place of business as a connecting factor, or that a more general approach should be taken, which would be applicable to the entire Convention, to the effect that where there was no place of business, what counted was the habitual residence. The drafting group had proposed making such an addition to article 22, but not to article 1. The intent was, however, the same, and the Commission was already familiar with the idea from the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, under which reciprocity would not obtain if the place where such an award had been made was in a territory that had not implemented the Convention. The matter would be taken up under the Commission's discussion of article 1, at which stage it might or might not be decided either to have a general provision or to deal with the matter in individual articles.

**Article D**

8. **Mr. BURMAN** (United States of America) pointed out that the Commission had not yet formally adopted a provision on declarations and that if it did not do so, it would not need to keep article D.

**Article E**

9. **Mr. SHIMIZU** (Japan) said he had two problems with articles 1 and 20, which affected his delegation's ability to accept article E. He could not understand the legal nature of article 1, paragraph (2), and asked whether an international letter of credit always had the same independent character as the undertaking defined by article 2. If that was so, there was no problem; if it was not always so, however, it did not make sense to apply the Convention to that type of letter of credit, and Contracting States should be permitted to opt out by way of reservation.

10. As to article 20, while he fully understood the underlying policy of limiting a situation in which the principal/applicant could intervene in the relationship between the guarantor and the beneficiary in order to secure the independent character of the undertaking, the way it was expressed was somewhat questionable and in fact went too far. In particular, the phrases "high probability" and "strong evidence" were acceptable if they were confined only to the present Convention, but if in the context of Japan's national legal system as a whole, such a provision would seem very strange. It would mean qualifying the strength of evidence in accordance with the legal character of each monetary claim. Paragraph (3) of article 20 was also too restrictive. While he agreed as to the value of the uniformity of application, he also valued the importance

*(Mr. Shimizu, Japan)*

of achieving justice in a given place, especially at the preliminary injunction stage. Accordingly, he proposedthat a Contracting State might declare at the time of signature or acceptance that it would not be bound by article 20 of the Convention.

11. **Mr. HERRMANN** (Secretary of the Commission) said, with reference to article 20, that if Japan became a party to the Convention and took advantage of the possibility of making a reservation, as that country's representative had proposed it should be able to, its courts would not apply the provisions of article 20. There might still be some uncertainties if there was a guarantor in Japan and a principal in another country, or vice versa. The question at issue, however, emerged more clearly in relation to article 1, paragraph (2). In a situation where the parties — a bank from one country and a beneficiary from another, for example — stipulated in their letter of credit that the Convention would apply, the question was, if a dispute arose and the case went before a court in Japan, whether that court, by virtue of the reservation at present being envisaged, would be bound not to recognize the parties' choice. Alternatively, the reservation might be intended to have an effect similar to that in article 12 of the United Nations Convention on Contracts for the International Sale of Goods, which would be to have a closer link to some party in Japan. The question of effect had indeed led to some controversy with regard to article 12 of the Sales Convention. Such questions should, therefore, be asked, particularly with regard to article 1, paragraph (2), in which it was important to clarify what the intended effect was, because that would dictate how to phrase the reservation.

12. **Mr. SHIMIZU** (Japan) said that the notion of an international letter of credit was still unclear, as there might be a case in which such a letter did not have the independent character defined in article 2. If the parties to a given international letter of credit chose to apply the Convention, even when that letter did not have an independent character, it was not reasonable to oblige the Contracting State to apply the provisions of the Convention to that type of letter of credit.

13. **Mr. LAMBERTZ** (Observer for Sweden) asked in connection with article 1 (1) whether a reservation would be needed if a country wished to pass a law making the Convention system mandatory in whole or in part. If parties to an undertaking agreed that the Convention should not apply to their undertaking, but the country of one party had made the Convention mandatory and it was the law of that country that applied, he assumed that the Convention would apply despite the parties' agreement to the contrary.

14. **Mr. HERRMANN** (Secretary of the Commission) drew attention to article 1 (1) (b), which provided that the Convention would apply if the rules of private international law led to the application of the law of a Contracting State. If that law contained a provision stating that the Convention was excluded in certain transactions, effect would have to be given to it. A solution might be for the Contracting State to abrogate all its national rules on independent guarantees and stand-by letters of credit and use the Convention system instead.

15. **Mr. GRANDINO RODAS** (Brazil) agreed with the Japanese representative's proposal on the possibility of making reservations to article 20. He understood that if such a reservation were made, the question of provisional court measures would be left entirely to national law.

16. **Mr. BURMAN** (United States of America), referring to questions asked about the independence of an international letter of credit, said that in his experience no international letter of credit properly denominated as such was not independent. He had found no difficulty with the language in question in letter-of-credit law. Moreover, if the provision was optional for the parties, that should provide sufficient protection.

17. With regard to the comments on article 20, he stressed that that article was a crucial provision in the Convention, since it was essential to have a fairly high level of assurance of payment. One way to achieve that was to make it clear when provisional court measures could be sought. He recommended that no modifications should be made to a provision which had been very carefully drafted.

18. **Ms. CZERWENKA** (Germany) considered that reservations should not be allowed, since they would weaken the uniform rules of the Convention, which had been developed over many years. She understood that many delegations might have problems with implementing article 20 because of their national laws, but believed that the article was a very basic one, merely signalling that provisional court measures should be allowed in certain circumstances. She agreed with the drafting group's view that the provision should stand.

19. She shared the concern expressed by the representative of Japan on article 1 (2), that the rule dealt with issues falling outside the scope of application of the Convention and that States would be bound by that rule without knowing exactly what it involved. The best way would be to delete the paragraph altogether. However, she did not think that a reservation clause would be justified.

20. She did not agree with the observer for Sweden that it was necessary to allow by way of reservation that the Convention should be mandatory. There had been general agreement that the Convention should be non-mandatory because parties to an undertaking could opt out, and she did not wish to change that approach.

21. **Mr. SHANG Ming** (China) agreed with the points made by the representative of Japan on reservations and considered that reservations should be allowed on articles of the Convention conflicting with national law.

22. **Mr. GAUTHIER** (Chairman of the Committee of the Whole) observed that, after a consensus had been reached on the substantive terms of the Convention, those who disliked that consensus were now using the suggestion that reservations should be allowed as a last opportunity to restate their positions. He did not approve of that approach. A reservation would not apply merely to an individual country, but would restrict that country's dealings with all other signatories. He had understood that the representative of China was asking to be given freedom to choose the articles it wished to apply by means of a reservation.

23. **Mr. SHANG Ming** (China) replied that his delegation was not trying to overturn what had been agreed, but merely to express its desire that the Convention should receive broad international acceptance. In the absence of a reservation clause, many States would be unable to sign the Convention. There were certain important articles on which there were conflicting views, and it should be possible for delegations to enter reservations on those points.

24. **Mr. LAMBERTZ** (Observer for Sweden) asked for a clear answer as to whether, if Sweden ratified the Convention, it could, without entering a reservation, incorporate into its law a provision stating that the Convention was to apply as Swedish law and that the parties to an undertaking might not exclude the application of that law. If not, it might be possible to provide that parties to an undertaking might not exclude the application of Swedish law as it concerned the relation between beneficiary and principal.

25. **Mr. HERRMANN** (Secretary of the Commission) said that the desired result could probably be achieved by embodying the legal system of the Convention in Swedish law. Excluding the application of one legal system meant that another legal system was applicable. Sweden would have a right to regulate only when Swedish law, not another law, applied. For that a reservation would not be required. The obligation of a signatory, unless it entered a reservation, was to apply the Convention as it stood, including the parties' possibility of excluding its application.

26. **Mr. LAMBERTZ** (Observer for Sweden) said that he was satisfied with that reply and would not ask for the possibility of entering a reservation.

27. **Mr. BONELL** (Italy) urged delegations not to insist on having a reservation clause included in the Convention. There had been a time in the process of drafting the Convention when the approach had been that in order to get an international instrument on the table, it was better to proceed as quickly as possible, without worrying too much about content, and that it would always be possible to put in a reservation at a late stage. However, it was not possible in an instrument of private international law to pick out certain articles from a systematic body of rules and then pretend that the substance survived. All too many countries might wish to take advantage of the possibility of making reservations, and the result would be chaos.

28. **Mr. MARKUS** (Observer for Switzerland), agreeing with the representative of Italy, said that reservations should be avoided wherever possible. The Chinese proposal for a wide range of reservations would, in his view, render the application of the entire draft Convention virtually impossible. It should be borne in mind that a reservation entered to a rule by one Contracting State would lead to non-application of that rule by the other States parties and their courts. In particular, reservations should not be permitted on article 20. That article was the cornerstone of the draft Convention and dealt with its most sensitive legal issue. Like the representative of Germany, he regarded article 20 as a minimum standard for national procedural law and not as a precise rule. States with higher standards were unjustified in fearing that without the possibility of reservations they would sacrifice something procedurally. With regard to the Japanese proposal to allow reservations to article 1, paragraph (2), he would have preferred to adopt the solution of deleting the provision, as suggested by the German delegation, but it was now too late.

29. **The CHAIRMAN**, speaking as representative of Singapore, said that his delegation was not in favour of including in the draft Convention a provision allowing reservations to be made to any of its articles. The Commission had spent years endeavouring to achieve uniformity in the law on stand-by letters of credit and independent guarantees. To permit reservations would mean that the international trading community would have no certainty as to the rules governing payment.

30. **Mr. MAHASARANOND** (Thailand) said that his delegation shared the view that reservations should be possible. The draft Convention was a type of model law, and States should be allowed flexibility in its implementation. Otherwise they might be reluctant to become parties to it.

31. **Mr. CHOUKRI SBAI** (Observer for Morocco) said that his delegation considered that the discussion on whether to allow reservations should not be linked to individual articles of the draft Convention, since full agreement had already been reached on the text. Adoption of the Chinese proposal could have led to reservations permitting non-application of the entire draft Convention, which was unacceptable. The instrument contained a number of flexible provisions, particularly those in articles 21 and 22. Article E of the final clauses should therefore be retained; that would contribute towards the pursuit of the Commission's aim of fostering the harmonization of international trade law.

32. In Morocco, ratification of a convention gave rise to the enactment of a new law and the corresponding amendment of previous laws. The question whether international law should prevail over national law in cases of conflict was a matter for consideration by jurists and not the Commission. Conflict situations could arise in connection with all international instruments, not just the present draft Convention.

33. **Mr. EDWARDS** (Australia) said that after all the years spent on achieving consensus, the moment had now come for the Commission to decide whether it wished to adopt article E. He believed that there was considerable support for its retention.

34. **Ms. BAZAROVA** (Russian Federation) said that her delegation was in favour of retaining article E. Accepting that some countries might not become signatories to the draft Convention was preferable to envisaging the difficulties to which the entering of reservations would give rise. It was more important to have a unified international instrument.

35. **Mr. GAUTHIER** (Chairman of the Committee of the Whole) pointed out that the draft Convention reinforced party autonomy in many respects. If parties were denied the right to make reservations, that would to some extent be counterbalanced by their ability to adapt the rules to suit themselves. He felt that there was general agreement that reservations should not be permitted and took it that the Commission wished to approve article E as it stood.

*The meeting was suspended at 11.25 a.m. and resumed at 11.50 a.m.*

**Article F** (A/CN.9/411)

36. **Mr. BURMAN** (United States of America) said that his delegation had originally considered that five ratifications constituted a convenient threshold for entry into force of the draft Convention, but that he understood that some delegations might prefer three.

37. **Ms. CZERWENKA** (Germany) said that in her delegation's view, the adoption of a smaller minimum number of ratifications would impair the Convention's international character. The text of the article should therefore retain the word "fifth".

38. **Mr. LAMBERTZ** (Observer for Sweden) pointed out that the word "States" appearing in the second line of paragraph (3) should in fact be in the singular.

39. **Mr. BURMAN** (United States of America) wondered whether it should be specified that the conflict-of-laws rule under paragraph (1 *bis*) of article 1 (A/CN.9/XXVIII/CRP.2), which presumably had force solely in a Contracting State, also applied only to undertakings issued on or after the date when that State became a party to the draft Convention.

40. **Mr. HERRMANN** (Secretary of the Commission) said that there were arguments on both sides. It could be said that whenever a court had to determine a conflict-of-laws issue, the provisions should apply irrespective of when the Contracting State accepted such rules and the undertaking was issued. If, however, it was felt that some time-limit should be set, it would be necessary to find the right place for it. The present provision did not cover the problem, since it did not refer to articles 21 and 22. In a substantive law regime there was good reason for a time-limit in that the parties to a transaction ought to know their obligations and rights. However, he felt there was less practical need for such a limit in relation to the question as to which rules of private international law applied, which would indirectly determine the relevant substantive law. The differences were not great. There seemed to him less need for preventing the parties from getting into a situation in which their instrument would later become subject to a private international law regime because they had not foreseen at the time that their State would become a Contracting Party.

41. **Mr. BURMAN** (United States of America), observing there to be little interest in the issue, withdrew his suggestion.

42. **Mr. GAUTHIER** (Chairman of the Committee of the Whole) said he took it that article F, with the drafting change suggestion by Sweden, was acceptable.

**Article G** (A/CN.9/411)

43. **Mr. BURMAN** (United States of America) wondered whether it would be possible to change the word "denunciation", which in English was very strong, for a milder term such as "withdrawal". He realized that the word "denunciation" was the normal term used in treaty language, but many people examining the treaty tended to assume that it implied a major political act rather than mere withdrawal. It was purely a matter of drafting.

44. **Ms. CZERWENKA** (Germany) considered that the text should stick to the normal treaty language, since a change might raise the question as to why it had been made. In regard to paragraph (1), she wondered whether it was a common practice to allow denunciation "at any time", which could mean before the Convention entered into force. Some conventions set restrictions on when they could be denounced.

45. **Mr. HERRMANN** (Secretary of the Commission) said that the paragraph implied that only a Contracting State could denounce the Convention, though any Government was of course free to make any declaration it wished on the subject.

46. **Ms. CZERWENKA** (Germany) said that use of the term "Contracting State" did not make it entirely clear whether the treaty had entered into force for that State.

47. **Mr. HERRMAN** (Secretary of the Commission) said that if, for example, only three States had so far signed the Convention, any one of them could reduce the chances of its entering into force by denouncing it.

48. **Mr. PELICHET** (Observer for the Hague Conference of Private International Law) asked whether the fact that no provision had been made for a federal State to denounce the Convention on behalf of one of its territorial units was deliberate.

49. **Mr. HERRMANN** (Secretary of the Commission) said that if a federal State wished to have other clauses, the Commission would first have to decide on the principle and the Secretariat would then assist such a State to find the additional wording necessary.

50. **Mr. GAUTHIER** (Chairman of the Committee of the Whole) said he took it that the Commission preferred to retain the word "denunciation" and was satisfied with the text of the article as it stood.

**Report of the drafting group** (A/CN.9/XXVIII/CRP.2 and Add. 1-4)

51. **Mr. SAHAYDACHNY** (Secretariat), introducing the report of the drafting group (A/CN.9/XXVIII/CRP.2 and Add. 1-4), said that article 1 contained a new paragraph (1 *bis*) that was not new in substance, but represented a reformulation of the previous paragraph (3) concerning the application of articles 21 and 22. The drafting group had considered moving that provision to chapter VI, but had decided to keep it in article 1 in order to clarify the intended effect. The group had also discussed the advisability of including the term "habitual residence" to cover cases in which a party did not have a "place of business", the term used in paragraph (1) (a), but had decided against, partly because the possibility of issuing an undertaking from a "habitual residence" was suggested by the use of that term in article 4 (2) (b). The drafting group had also felt that use of "habitual residence" for "place of business" as a general rule for interpretation of the Convention might have unforeseen implications. As the term was needed in article 4 (2) (b), its inclusion as a general rule in article 1 might appear to repeat that provision. Moreover, such a rule of interpretation might detract from the general approach used in the Convention, that relevant information such as the place of issuance should appear on the face of the instruments. It might be possible to include a specific reference to the "habitual residence" in article 22 for the purpose of determining the applicable law, but that might require a reference to the term in article 1 (1) (a).

52. **Mr. GAUTHIER** (Chairman of the Committee of the Whole) said that as members might want to think over the observations just made regarding the term "habitual residence", he would return to the question later.

53. He took it that paragraph (2) reflected the decisions of the Commission.

54. He asked whether paragraph (1 *bis*) reflected the Commission's request to the drafting group to produce a more accurate and satisfactory text.

55. **Ms. CZERWENKA** (Germany) said that Germany had several problems with the draft of article 1, paragraph (1 *bis*). The opening phrase "In any situation involving a choice between the laws of different States" was presumably intended to replace the word "international", but she did not recall any suggestion that that word should be interpreted in such a way. She was not sure what the phrase meant, but upon its meaning depended the application of articles 21 and 22. In her view, the text lacked clarity. Germany's position was that the scope of articles 21 and 22 should be limited to international undertakings, a view that had been reflected in the previous version of the draft Convention reproduced in document A/CN.9/408 by use of the term "international undertakings". There should only be one definition of internationality, so that the scope of application for articles 21 and 22 would be limited to international undertakings as defined in articles 2 and 4, but that view had not been properly reflected in the wording chosen by the drafting group. The opening phrase of paragraph (1 *bis*) was not identical to the definition given in article 4 and the text did

*(Ms. Czerwenka, Germany)*

not reflect the discussion in the Commission. There also appeared to be a problem with the general structure of paragraphs (1) and (1 *bis*). Paragraph (1) stated that the Convention, meaning the Convention as a whole and not the Convention except for articles 21 and 22, applied in certain specific circumstances. But should specific provisions rather than the Convention as a whole be applied, problems might be raised regarding the application of articles 5 and 6. In Germany's view, those articles should be seen as part of articles 21 and 22. In short, the draft text had not captured the original idea that the Convention applied to all international undertakings defined in article 2 but that the substantive provisions — that is, articles 7 to 20 — should have a more limited scope of application. She did not think that the text had solved the problems discussed in the Working Group. Germany had put forward a drafting proposal, which, however, had not been accepted by the Secretary.

56. **Mr. HERRMANN** (Secretary of the Commission) said that it was not at all up to the Secretary to decide whether a proposed amendment was acceptable or not. He had seen the draft submitted, had made comments upon it and had understood that the explanation he had given had satisfied the representative of Germany. One reason why there was no specific link between paragraphs (1) and (1 *bis*) arose from the drafting technique used by UNCITRAL, according to which no cross-reference was made to another part of the same article. Consideration had been given to placing the provision in a later part of the Convention, but that would only have increased Germany's concern. It might be possible to introduce a new article, which would be article 23 in chapter VI, and amount to a separate convention within the Convention.

57. **Mr. SAHAYDACHNY** (Secretariat) read out the suggested text, which was as follows:

"**Article 23**

"The provisions of articles 21 and 22 apply to international undertakings referred to in article 2 independently of article 1, paragraph (1)."

*The meeting rose at 12.40 p.m.*

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SUMMARY RECORD (PARTIAL)* OF THE 564th MEETING

Held at the Vienna International Centre, Vienna,
on Friday, 12 May 1995, at 2 p.m.

**Chairman**: Mr. GOH (Singapore)

**Chairman of the Committee of the Whole:** Mr. GAUTHIER (Canada)

CONTENTS

Draft Convention on Independent Guarantees and Stand-by Letters of Credit (*continued*)

Report of the drafting group (*continued*)

Decision of the Commission and recommendation to the General Assembly

* No summary record was prepared for the rest of the meeting.

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Distr.: 21 November 1995

*The meeting was called to order at 2.10 p.m.*

**DRAFT CONVENTION ON INDEPENDENT GUARANTEES AND STAND-BY LETTERS OF CREDIT** (*continued*) (A/CN.9/405, A/CN.9/408, A/CN.9/411)

**Report of the drafting group** (*continued*) (A/CN.9/XXVIII/CRP.2 and Add.1-5)

1. **Mr. GAUTHIER** (Chairman of the Committee of the Whole) reminded the Commission that two points were outstanding on article 1: the idea of making a reference to "habitual residence" and the question of the conflict-of-law rule. There were two alternatives for the latter: paragraph (1 *bis*) as proposed by the drafting group (A/CN.9/XXVIII/CRP.2) and the article 23 suggested by the Secretariat at the end of the previous meeting. Both of them raised the issue whether the rule should refer to "international undertakings" or simply "undertakings". He invited the Commission to deal with the conflict rule first.

2. **Mr. PELICHET** (Observer for the Hague Conference on Private International Law) said that the conflict-of-law rule was intended to be a general rule operating independently of the Convention, and should therefore cover all situations in which a conflict of laws could arise in a State. Consequently, he urged the deletion of the word "international".

3. **Mr. FAYERS** (United Kingdom) agreed that the word "international" should be deleted.

4. **Mr. BONELL** (Italy) disagreed. His delegation understood that articles 21 and 22 applied to international undertakings precisely because they appeared in an instrument dealing with undertakings of that kind. The deletion of the word "international" from the conflict rule would create considerable problems, because the rule would then suggest that, under article 21, a purely internal guarantee could be subjected to the law of a foreign jurisdiction. With regard to the location of the conflict rule, which for the moment he would call "article X", his delegation wished it to be moved from article 1 to chapter VI, or a possible chapter VII. It should read as suggested by the Secretariat, but with the words "as referred to in article 2" replaced by the words "as defined in article 2 and article 4". In addition, in order to alert the reader to the situation from the start, the provision in article 1 (1) should begin with the following words: "Subject to article X, this Convention applies ...".

5. **Mr. GAUTHIER** (Chairman of the Committee of the Whole) said he did not think there was any intention that the Convention should apply to domestic undertakings.

6. **Mr. EDWARDS** (Australia) said his delegation could accept the rule with or without the word "international". It would prefer the word to be retained, however, so as to dispel any idea that the Convention might apply to undertakings generally.

7. **Ms. FENG Aimin** (China) said that the term "undertaking" was new in the context of the subject and had been coined specifically for the purposes of the Convention. Consequently, she could not see that a problem would arise if the word "international" were omitted.

8. **Mr. GAUTHIER** (Chairman of the Committee of the Whole) noted that there was no strong support for the deletion of the word. He took it that the Commission wished to retain it.

9. *It was so agreed.*

10. **Mr. PELICHET** (Observer for the Hague Conference on Private International Law), referring to the question of the location of the conflict rule, said that he had a strong preference for the suggestion that it should be placed in chapter VI. If it remained in article 1, there was a risk of misinterpretation. Moreover, the wording suggested by the Secretariat was simpler and partly disposed of the concern expressed by the German delegation at the previous meeting.

11. **Mr. BURMAN** (United States of America) endorsed the suggestion to move the conflict rule to chapter VI. He asked whether acceptance of that suggestion implied acceptance of the amending language proposed by Italy.

12. **Ms. CZERWENKA** (Germany) said that the scope of the conflict rule suggested by the Secretariat would not be clear without an express reference articles 4 and 6.

13. **Mr. GAUTHIER** (Chairman of the Committee of the Whole) said that a possible solution might be to replace paragraph (1 *bis*) by a modified version of article 1 (3) of the Working Group's draft (A/CN.9/408), as follows: "The provisions of articles 21 and 22 apply to international undertakings as defined in article 2, independently of paragraph (1) of this article".

14. **Ms. CZERWENKA** (Germany) said that she could accept the Chairman's proposal but would suggest that the words "as defined in article 2" be replaced by "as defined in this Convention". That would broaden the reference to include the definition of internationality and would overcome the problem of deciding to which provisions reference should be made.

15. **Mr. GAUTHIER** (Chairman of the Committee of the Whole) asked whether there was support for that suggestion.

16. **Mr. BURMAN** (United States of America) said that, since it had been decided earlier that the qualifying word "international" should be retained, it would be inappropriate to refer to article 2 only. Otherwise, it was a matter of drafting.

17. **Mr. HERRMANN** (Secretary of the Commission) said that the Commission had already approved the wording of article 1 (1), which included the phrase "an international undertaking referred to in article 2", to which no further qualification was added. It would not be the same to say "as defined in the Convention", since that brought in rights and obligations.

18. **Mr. BONELL** (Italy) said that he disagreed with that view. A reference limited to article 2 would leave in doubt not only the meaning of "international" but also other points related to what an undertaking was. The problems would be solved by the suggestion made by the German delegation.

19. **Mr. GAUTHIER** (Chairman of the Committee of the Whole) said that the present task of the Commission was to ensure that its decisions had been implemented by the drafting group in its report and not to re-open discussions on matters already decided upon when article 1 had originally been discussed. He therefore suggested that the Commission should take up the question of habitual residence. He recalled that the drafting group had decided against including the term "habitual residence" in article 1 and he wished to propose that language be inserted in article 6 as follows: "'place of business' refers to habitual residence if the person in question does not have a place of business", on the understanding that the rule contained in article 4 (2) (b) would not be amended.

20. **Ms. CZERWENKA** (Germany) said it appeared that the discussion on the conflict-of-law question was to be regarded as closed. In her view, the matter had been one of drafting and not of substance. She regretted that the Commission had not been able to agree to clarify drafting issues. It would be more difficult for States to adhere to the Convention if they were uncertain as to the meaning of terms.

21. **Mr. FAYERS** (United Kingdom) said that he endorsed the remarks of the representative of Germany. Whenever points in doubt were raised by any delegation, it was necessary to attempt to clarify them.

22. **Mr. PELICHET** (Observer for the Hague Conference on Private International Law) said that the positioning and wording of the conflict-of-law rule was, in his opinion, not a drafting question but a substantive issue.

23. Turning to the proposal concerning habitual residence, he felt that the drafting group's approach of dealing with the matter in article 22 only was a good one. If it was dealt with in article 6, there would still be a need to refer to the term "habitual residence" in article 22, since article 22 would apply independently of the Convention in cases where the Convention was not applicable. Moreover, if it was stated in article 6 that "place of business" meant "habitual residence" where there was no place of business, that would affect the scope of application in article 1. Replacing "place of business" by "habitual residence" in article 1 (1) (a) would have the result of requiring the place of issuance to coincide with the habitual residence of the guarantor/issuer. That could not be the intention. It would be better to have the rare cases involving habitual residence dealt with only under the conflict rule in article 22.

24. **Mr. LAMBERTZ** (Observer for Sweden) said that, although he would have supported the German proposal for a reference to the whole Convention, he agreed that the discussion on that matter should now be closed. With regard to the term "habitual residence", he was in favour of including explanatory language in article 6, as the Chairman proposed. That would be preferable to having different definitions in article 1 and article 22.

25. **Mr. GAUTHIER** (Chairman of the Committee of the Whole) said that his suggestion was to have a definition of "place of business" in article 6 and no reference to "habitual residence" in article 22.

26. **Mr. PELICHET** (Observer for the Hague Conference on Private International Law) asked how article 1 (1) (a) would then be interpreted, for example if a private person issued an undertaking at a place that was not his habitual residence. Clearly, if the Commission agreed to add the proposed rule in article 6, it would be necessary to reformulate article 1 (1) (a).

27. **Mr. HERRMANN** (Secretary of the Commission) wondered whether, if persons without a place of business were not to be covered by article 1 (1) (a), the intention was that they should be covered under article 1 (1) (b), under rules of private international law. The Chairman's proposal was to deal with the matter in a rule of interpretation in article 6. In cases such as that referred to by the observer for the Hague Conference on Private International Law, the assumption was that common sense would be relied on in the interpretation of the Convention.

28. **Mr. MARKUS** (Observer for Switzerland) said he was concerned that the inclusion of the proposed rule of interpretation in article 6 would have the effect of extending the scope of application of the Convention under article 1. He therefore had doubts about the proposed change in article 6. With regard to article 22, it would be best to be consistent and not include a reference to "habitual residence" there unless one was to be included in article 1 also.

29. **Mr. BURMAN** (United States of America) said that the easiest solution might be to delete the reference to "habitual residence" in article 22. Certainly there should be no reference to "habitual residence" in article 1. The point that the proposals attempted to cover was of minimal importance to the business world. Private persons need not be regulated by the Convention.

30. **Mr. GAUTHIER** (Chairman of the Committee of the Whole) said that the solution of deleting the reference in article 22 was perhaps the best one. He would take it that the Commission wished to adopt the text of article 1 proposed by the drafting group, with paragraph (1 *bis*) replaced by a new paragraph (3) with the wording that he had read out, on the understanding that the reference to habitual residence would be deleted in article 22.

31. *It was so decided.*

**Article 2, paragraph (1)**

32. **Mr. SHISHIDO** (Japan) wondered whether the insertion of the words "subject to article 15" after "determinable amount" in the third and fourth lines might make it clearer that purely oral demands were not admissible.

33. **Mr. GAUTHIER** (Chairman of the Committee of the Whole) said he believed that there was general agreement that the phrase "accompanied by other documents", appearing in the fourth line, adequately conveyed the idea that all demands had to be documentary in nature. He took it that the Commission wished to adopt the changes proposed by the drafting group.

34. *It was so decided.*

**Article 3**

35. *The proposed changes were adopted.*

**Article 6**

36. **Ms. CZERWENKA** (Germany) wondered why her delegation's proposal that subparagraph (f) be amended to read "'confirmer' means the person issuing the confirmation" had not been taken up by the drafting group.

37. **Mr. SAHAYDACHNY** (Secretariat) explained that the drafting group had felt that to use the word "issuing" raised a drafting problem in that it might bring in the notion of the issuance of the undertaking.

38. **Mr. FAYERS** (United Kingdom) suggested that the problem might be solved by using the word "adding" rather than "issuing" in the text proposed by Germany.

39. **Mr. GAUTHIER** (Chairman of the Committee of the Whole) asked whether there was agreement that subparagraph (f) should read: "'confirmer' means the person adding a confirmation to an undertaking".

40. *It was so decided.*

41. **Mr. GAUTHIER** (Chairman of the Committee of the Whole) said he took it that the Commission wished to adopt the text of article 6 proposed by the drafting group, as amended.

42. *It was so decided.*

**Article 8**

43. **Mr. SAHAYDACHNY** (Secretariat) said that the text proposed by the drafting group (A/CN.9/XXVIII/CRP.2/Add.1) attempted to implement the Commission's decision to eliminate the reference to an amendment consisting solely of an extension to the validity period of the undertaking, as had appeared in the earlier draft of paragraph (2) (A/CN.9/408, annex). A new paragraph (2 *bis*) had been created in order to make it clearer that the rule concerning the effective date of a previously authorized amendment and the rule concerning the effective date of other amendments were both subject to party autonomy.

44. **Ms. FENG Aimin** (China) said that her delegation still felt that article 8 would give rise to problems of interpretation in the banking world. Its provisions differed considerably from those of the Uniform Customs and Practice for Documentary Credits (UCP); for example, the UCP terms stipulated that the presentation of documents could also serve as a form of amendment. If no further changes were made to the article, she hoped that a reference to the issue would be included in the Commission's report.

45. **Mr. GAUTHIER** (Chairman of the Committee of the Whole) said that he appreciated the point raised by the representative of China but took it that the Commission was generally satisfied with the text proposed by the drafting group and wished to adopt it.

46. *It was so decided.*

**Article 9, paragraph (1)**

47. *The proposed change was adopted.*

**Article 10, paragraph (2)**

48. *The proposed change was adopted.*

**Article 11, paragraph (1)** (A/CN.9/XXVIII/CRP.2/Add.2)

49. *The proposed changes were adopted.*

**Article 12 (b)**

50. **Mr. FAYERS** (United Kingdom) said that the words "is informed" had been proposed by the drafting group to replace "receives confirmation" because the latter phrase might present difficulties given that

*(Mr. Fayers, United Kingdom)*

"confirmation" was a defined term. He believed that a delegation was not in favour of the formulation "is informed", and he therefore wondered whether "receives a notice" would be a more acceptable alternative.

51. **Mr. GAUTHIER** (Chairman of the Committee of the Whole) said that the phrase "receives a notice" might imply that two documents were involved.

52. **Mr. BONELL** (Italy) agreed that a notice could be understood as constituting a separate communication from the document presented.

53. **Mr. BURMAN** (United States of America) said that the word "informed" had an informal connotation in legal usage. Perhaps the expression "receives acknowledgement" would better convey the content of a business communication.

54. **Mr. EDWARDS** (Australia) suggested that the words "is advised" should be used.

55. *It was so decided.*

**Article 12 (c)**

56. **Mr. SAHAYDACHNY** (Secretariat) explained that the drafting group had inserted the phrase "and an expiry date has not been stated in addition" in order to reflect a proposal made by Germany, but had placed it inside square brackets since it was not felt to be strictly necessary.

57. **Mr. EDWARDS** (Australia) said that in his view the inserted phrase read awkwardly. Perhaps it would be helpful if the square brackets were replaced by round brackets.

58. **Mr. GAUTHIER** (Chairman of the Committee of the Whole) said he did not think that brackets were needed. If he heard no objection, he would take it that the Commission wished to adopt the proposed text (A/CN.9/XXVIII/CRP.2/Add.3) subject to deletion of the square brackets.

59. *It was so decided.*

**Article 13, paragraph (1)**

60. *The proposed changes were adopted.*

**Article 15**

61. **Ms. CZERWENKA** (Germany) drew attention to the inconsistency between the reference in paragraph (3) to subparagraphs (i), (ii) and (iii) of article 19 (1) and the redrafted form of article 19 itself.

62. **Mr. GAUTHIER** (Chairman of the Committee of the Whole) said that the Secretariat would amend the reference accordingly. He took it that the Commission wished to adopt the proposed text on that understanding.

63. *It was so decided.*

**Article 16**

64. **Mr. SAHAYDACHNY** (Secretariat) recalled that the drafting group had been asked to consider whether, in order to reinforce the notion of the documentary character of the demand, the word "other" should be inserted at those points where the draft Convention referred to accompanying documents, as had been done, for example, in article 2. The word "other" therefore appeared in paragraph (1) and in the *chapeau* and subparagraph (a) of paragraph (2) but had been placed inside square brackets since it had been felt that the context of the article might render its insertion unnecessary (see document A/CN.9/XXVIII/CRP.2/Add.4).

65. **Mr. BURMAN** (United States of America) questioned the need for a comma after "other".

66. **The CHAIRMAN**, speaking as representative of Singapore, said that his delegation felt that the inclusion of the word "other" was unnecessary. It wished to propose that the phrase "and any [other,] accompanying documents" be replaced by "and accompanying documents, if any,".

67. **Mr. HERRMANN** (Secretary of the Commission) said that it had long been the Commission's drafting practice to use "any ..." to signify "... if any". With regard to the comma appearing after "other", its omission would mean that the accompanying documents were in addition to an existing set of accompanying documents.

68. **Mr. EDWARDS** (Australia) said that, as he saw it, if the formulation "any accompanying documents" was used, the word "other" would be redundant. The present case was not comparable with article 2, since the text there said "demand accompanied by other documents". That was an entirely different usage of language. He therefore recommended that "[other,]" be deleted in the three instances where it appeared.

69. *It was so decided.*

70. **Mr. GAUTHIER** (Chairman of the Committee of the Whole) said he took it that the Commission wished to adopt the drafting group's text as amended.

71. *It was so decided.*

**Article 17**

72. *The proposed change was adopted.*

*The meeting was suspended at 4 p.m. and resumed at 4.10 p.m.*

**Article 18**

73. *The proposed change was adopted.*

**Article 19, paragraph (2) (e)** (A/CN.9/XXVIII/CRP.2/Add.5)

74. *The proposed change was adopted.*

**Article 19, paragraph (3)**

75. **Mr. GAUTHIER** (Chairman of the Committee of the Whole) said that, with a view to avoiding a protracted discussion of the text, he wished to propose that the opening phrase "In the circumstances set out in paragraph (1) of this article" be deleted and the rest be reworded as follows: "The principal/applicant is entitled to provisional court measures in accordance with article 20". If the reference to paragraph (1) was omitted, the difficulties encountered by the Commission regarding the standard of manifest and clear evidence would be circumvented, and the adoption of the simplified formulation "is entitled to provisional court measures" would resolve the problem of choosing between the verbs "obtain" and "seek", both of which had drawbacks.

76. **Mr. EDWARDS** (Australia) thought that the word "seek" was needed, since otherwise the text would imply an entitlement to the measures of injunctive relief themselves.

77. **Mr. GAUTHIER** (Chairman of the Committee of the Whole) said that in some jurisdictions the word "seek" did not go as far as signifying a substantive right to apply to the court. The word "obtain" was also unsatisfactory, since it might create the impression that the applicant was virtually certain of being granted a provisional court order.

78. **Mr. BURMAN** (United States of America) said that, if the paragraph was amended as suggested, it would be unclear to the reader why it appeared in article 19 at all. As to the choice of verb, he felt that "seek" did not satisfactorily convey the idea of entitlement to initiate court action. If "obtain" was used, the problem it involved might be solved by qualifying it along the following lines: "a right to obtain depending upon proper evidence ...".

79. **Mr. BONELL** (Italy) agreed that the proposed new wording was open to misunderstanding. Perhaps paragraph (3) should be deleted altogether.

80. **Mr. FAYERS** (United Kingdom) said that his delegation could agree to the proposal made by the Chairman of the Committee of the Whole. However, some delegations required language that would first establish a ground for action to which the injunctive relief would be linked. It might therefore be better to retain the phrase "In the circumstances set out in paragraph (1) of this article".

81. **Ms. CZERWENKA** (Germany) said that, while she appreciated that the reason for the proposed deletion of the opening phrase of paragraph (3) was to avoid a reference to the standard of manifest and clear proof in paragraph (1), she nevertheless felt that some linkage between the two paragraphs was necessary. She would suggest that the opening phrase be retained but amended to read "In the circumstances set out in subparagraphs (a), (b) and (c) of paragraph (1) of this article". With regard to the choice of verb, her delegation could accept either "is entitled to a provisional court order" or "has a right to obtain a provisional court order".

82. **Mr. HERRMANN** (Secretary of the Commission) said that, if a reference was made in paragraph (3) to the specific circumstances indicated in subparagraphs (a), (b) and (c) of paragraph (1), that would create a more restrictive provision than if a reference was made to the "manifest and clear" evidential standard. The reason why it was now being proposed that a reference to paragraph (1) be omitted was the fact that the slightly lower standard of "high probability" was provided for in article 20, and it was important to avoid having two potentially conflicting rules. It would be almost impossible to describe precisely the conditions

*(Mr. Herrmann, Secretary of the Commission)*

under which there would be a right to obtain provisional relief without virtually duplicating what was said in article 20. It was thus preferable to omit a specific link between paragraphs (1) and (3) and to rely on the fact that they appeared in the same article and should therefore be read in conjunction.

83. **Mr. BURMAN** (United States of America) said that he would prefer to risk the possibility of an inappropriate standard of evidence being applied than the possibility of paragraph (3) being taken out of context and misinterpreted as relating not just to article 19.

84. **Mr. GAUTHIER** (Chairman of the Committee of the Whole) wondered whether, in view of the lack of support for his proposal, the Commission might wish to consider the wording: "In the circumstances set out in paragraph (1) of this article, the principal/applicant has a right to obtain a provisional court order in accordance with article 20".

85. **Mr. BURMAN** (United States of America) said that he found that wording generally acceptable but felt that it should make a restrictive reference to subparagraphs (a), (b) and (c) of paragraph (1). That would imply that the standard of manifest and clear evidence would not be used. It might be helpful if an explanatory statement was included in the Commission's report.

86. **Mr. BONELL** (Italy) agreed with the view expressed by the representatives of Germany and the United States of America.

87. **Mr. GAUTHIER** (Chairman of the Committee of the Whole) said he took it that the Commission wished to adopt the text he had just read out with the change suggested by the United States representative.

88. *It was so decided.*

**Article 20, paragraph (1)**

89. **Mr. AL-ZEID** (Observer for Kuwait) said that there was a discrepancy between the Arabic and English versions of paragraph (1); the phrase "instructing party" was inexactly rendered in the Arabic text. The Arabic version should be brought into line.

90. **Mr. FAYERS** (United Kingdom) said that his delegation wished to suggest that the words "issue a provisional order to the effect that" be removed from the last line of the *chapeau* and be inserted at the beginning of both subparagraph (a) and subparagraph (b). That would assist the flow of the text, particularly in view of the addition in subparagraph (a) of the phrase "including an order that the guarantor/issuer hold the amount of the undertaking".

91. **Mr. GAUTHIER** (Chairman of the Committee of the Whole) said he took it that the Commission wished to adopt the text proposed by the drafting group with the change suggested by the representative of the United Kingdom.

92. *It was so decided.*

**Article 20, paragraph (3)**

93. **Mr. PELICHET** (Observer for the Hague Conference on Private International Law) said that, in the French version, instead of "*pour toute circonstance autre*", it would be preferable to say "*pour toute raison autre*" or "*dans toute autre circonstance*".

94. **Mr. SHIMIZU** (Japan) said that, in the contractual relationship between the principal and guarantor, the principal was often entitled to require the guarantor to refuse to effect payment to the beneficiary. He wished to know whether article 19 (3) would have the effect of invalidating that contractual right by specifying the scope of a right that might be wider than the circumstances set out in subparagraphs (a), (b) and (c) of article 19 (1), and whether article 20 (3) would be construed as preventing the principal from seeking provisional court measures pursuant to its local law in connection with its contract with the guarantor. If his interpretation was correct, he would like it to be reflected in the Commission's report. The point had been discussed in the Working Group (A/CN.9/388, para. 38).

95. **Mr. BURMAN** (United States of America) thought that that point should be dealt with later, at the time of discussion of the Commission's report.

96. **Mr. GAUTHIER** (Chairman of the Committee of the Whole), agreeing with the representative of the United States of America, said he took it that the Commission wished to adopt the proposed text subject to amendment of the French version as requested by the observer for the Hague Conference on Private International Law.

97. *It was so decided.*

**Article 22**

98. **Mr. GAUTHIER** (Chairman of the Committee of the Whole) recalled that, in its earlier discussion of article 1, the Commission had agreed to delete the phrase "or the habitual residence" in article 22. He took it that the text was adopted without those words.

99. *It was so decided.*

100. **Mr. PELICHET** (Observer for the Hague Conference on Private International Law) said that he regretted that decision.

101. *The text set out in the report of the drafting group (A/CN.9/XXVIII/CRP.2 and Add.1-5), as amended, was adopted.*

**Decision of the Commission and recommendation to the General Assembly (A/CN.9/XXVIII/CRP.4)**

102. **Mr. HERRMANN** (Secretary of the Commission), introducing the document, said that, following past practice, notably in the case of the Convention on International Bills of Exchange and International Promissory Notes, the Secretariat was proposing that the Commission submit its finalized text of the draft Convention to the General Assembly with the recommendation that the General Assembly itself should conclude and adopt a United Nations Convention on Independent Guarantees and Stand-by Letters of Credit. As a sub-organ of the General Assembly, the Commission could not bind the General Assembly to do so,

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but he had been given to understand that such a recommendation would most probably receive a favourable response.

103. **Mr. BURMAN** (United States of America) said that his delegation welcomed the Secretariat's recommendation. The approach that it had adopted displayed an awareness of the budgetary constraints within the United Nations system and would be well received. Also, because of changes in the agenda of the Sixth Committee, there was a likelihood that there would be time for the recommendation, if made, to be processed at the forthcoming session of the General Assembly.

104. **Mr. GAUTHIER** (Chairman of the Committee of the Whole), observing that there were no objections, said he took it that the Commission wished to adopt the proposed decision.

105. *It was so decided.*

*The discussion covered in the summary record ended at 4.50 p.m.*